Caremore, Inc. d/b/a Altercare of Hartville *and* District 1199, the Health Care and Social Service Union a/w Service Employees International Union, AFL–CIO. Case 8–CA–26179

July 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Pursuant to a charge filed on February 28, 1994, and an amended charge filed on March 23, 1994, the General Counsel of the National Labor Relations Board issued a third amended complaint on May 9, 1994, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8–RC–14703. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On November 21, 1995, the General Counsel filed a Motion for Summary Judgment. On November 24, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 15, 1995, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent asserts, as defenses to its refusal to bargain, that the certification of the unit is contrary to law because it contains supervisory personnel and that the Respondent is under no duty to bargain with the Union because the unit sought is inappropriate for purposes of collective bargaining. In its response, the Respondent argues that the Board improperly included in the unit licensed practical nurses (LPNs) who responsibly direct the work of nurses' aides in the unit and are supervisors within the meaning of Section 2(11) of the Act under the standard enunciated in *NLRB v. Health Care & Retirement Corporation of America*, 114 S.Ct. 1778 (1994).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.[1] All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. However, we find that *NLRB v. Health Care & Retirement Corp.*, which issued subsequent to the underlying representation proceeding in this case, constitutes a special circumstance requiring the Board to reexamine its decision in the representation proceeding.[2]

In *Health Care & Retirement Corp.*, the Supreme Court rejected the Board's view that charge nurses were not supervisors within the meaning of Section 2(11) of the Act if their instructions to other employees were merely in furtherance of patient care. It found the Board's ''patient care'' analysis of the phrase ''in the interest of the employer'' in Section 2(11) was ''inconsistent with both the statutory language and this Court's precedents.'' (Id. at 1783.) The Regional Director's Decision and Direction of Election, which the Board essentially adopted in the representation phase of this proceeding, used the now-discredited ''patient care'' analysis in its discussion of the supervisory indicia of assignment and direction of other employees' work. Accordingly, we do not rely on that analysis and have independently reexamined the record in the representation proceeding in light of the Supreme Court's subsequent decision in *Health Care & Retirement Corp.*, supra.

Our review of the record persuades us that the LPNs' assignment of work and direction of employees in this case is routine and does not require independent judgment. The record reveals that aides need very little actual direction of their work because their tasks are routine, and they are familiar with their patients. Aides are assigned to a regular section, and LPN Becky Matovich testified that she only assigns aides to residents when she has new employees or aides from a temporary agency on her shift. In those situations, she assigns staff aides to the very sick residents and the temporary or new employees to the patients needing only a little help. The Board has found, however, that work assignments based on assessment of employees' skills, when the differences in skills are well known, are routine functions and do not require the exercise of independent judgment.[3]

On the day shift, the Staff Coordinator handles understaffing due to absences. On other shifts, an LPN will call off-duty employees as replacements to provide sufficient patient care. Replacements are contacted

[1] *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941).

[2] The Respondent first raised the issue of the authority of LPNs' responsibly to direct nurses' aides in its request for review of the Regional Director's Supplemental Decision and Certification of Representative in Case 8–RC–14703. The Board denied this request for review on September 20, 1993.

[3] See *Providence Hospital*, 320 NLRB 717 (1996).

according to a prepared list of employees. The LPNs can request, but not require, an off-duty employee to come in or work late. Further, LPNs cannot obtain replacements from temporary agencies without prior approval from an on-call authority. As the Board found in *Providence Hospital*, 320 NLRB at 732, ''[a]ssessing whether there is a high or low patient census warranting calling in extra help or letting staff off early is not significantly more complicated than counting the number of patients.'' Thus, we find that without the authority to compel an employee to work, the LPNs' responsibility to call in employees when necessary requires only routine judgment. For these reasons we agree with the Regional Director that the LPNs' limited assignment and direction of other employees does not require the use of independent judgment within the meaning of Section 2(11) of the Act.[4]

The Respondent's response to the Motion for Summary Judgment does not allege that the LPNs possess any of the other supervisory indicia specifically enumerated in Section 2(11). Moreover, the Regional Director found, and we agree, that the LPNs cannot hire or fire employees, or effectively recommend such actions. The LPNs do not have the authority to suspend, lay off, or recall employees. They cannot grant employees wage increases or promotions. There is no evidence that LPNs are involved in grievance handling. The LPNs do not attend management meetings, and are not involved in training of the aides. The staff coordinator handles scheduling. The absence reports completed when an employee calls off or is otherwise absent are merely reportorial in nature and do not constitute evidence of supervisory authority. Although LPNs have on occasion filled out ''Disciplinary Notice'' forms, the record indicates that aides as well as LPNs have access to the forms and can write up coworkers and that the administrator and the DON independently investigate employee misconduct before any discipline occurs.[5] Finally, while the LPNs have from time-to-time participated in the evaluation of aides, their participation was limited to sporadic or isolated instances that are insufficient to confer supervisory status.[6] All six evaluations introduced at the hearing were completed more than a year before the filing of the petition, and on only three of the six was the section recommending continued employment filled out. Further, the testimony of several aides at the hearing indicated that they had received regular raises although they had never been evaluated.

For these reasons, we conclude that the record supports the Regional Director's determination that the LPNs are not supervisors. We therefore reaffirm the Certification of Representative issued in Case 8–RC–14703, and find the Respondent's defense to the 8(a)(5) allegations to be without merit. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation, with an office and place of business in Hartville, Ohio, has been engaged in the operation, of an extended care facility providing inpatient medical care. Annually, the Respondent, in conducting its business operations, derives gross revenues in excess of $100,000 and receives in excess of $50,000 in Medicare payments from the Federal Government. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held August 14, 1992, the Union was certified on April 2, 1993, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time service and maintenance employees, including licensed practical nurses (LPNs), nurses' aides, dietary employees, laundry employees and housekeeping employees employed by the Employer at its Hartville, Ohio facility, but excluding all professional employees, office clerical employees and all guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

About November 23, 1992, the Union requested the Respondent to bargain, and since about August 28, 1993, the Respondent has failed and refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 28, 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

[4] *Ten Broeck Commons*, 320 NLRB 806 (1996); *Providence Hospital*, supra.

[5] *Passavant Health Center*, 284 NLRB 887 (1987).

[6] *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Caremore, Inc. d/b/a Altercare of Hartville, Hartville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District 1199, The Health Care and Social Service Union, a/w Service Employees International Union, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and part-time service and maintenance employees, including licensed practical nurses (LPNs), nurses' aides, dietary employees, laundry employees and housekeeping employees employed by the Employer at its Hartville, Ohio facility, but excluding all professional employees, office clerical employees and all guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its Hartville, Ohio facility, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 28, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

MEMBER COHEN, dissenting.

I conclude that the LPNs are supervisors.

The LPNs select which employees will be offered work opportunities if there is a need for additional help. Although they cannot require employees to come to work, they can offer them work opportunities.

Further, the evidence indicates that LPNs have participated in the evaluation of aides, and have made recommendations, in this respect, regarding continued employment. My colleagues say that this authority has been exercised only sporadically. Assuming arguendo that this is so, this fact does not undermine the proposition that they have the authority to evaluate, and that such authority has never been rescinded. Section 2(11) covers not only action but also the authority to take action.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 1199, The Health Care and Social Service Union, a/w Service Employees International Union, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on

terms and conditions of employment for our employees in the bargaining unit:

> All full-time and part-time service and maintenance employees, including licensed practical nurses (LPNs), nurses' aides, dietary employees, laundry employees and housekeeping employees employed by the Employer at its Hartville, Ohio facility, but excluding all professional employees, office clerical employees and all guards and supervisors as defined in the Act.

CAREMORE, INC. D/B/A ALTERCARE OF HARTVILLE